IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9425 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GAMBHIRSINH @ GAFUR RAISINH RAJPUT

Versus

COMMISSIONER OF POLICE

Appearance:

HL PATEL ADVOCATES for Petitioner

MR KAMAL MEHTA ADDL.GOVERNMENT PLEADER for Respondents

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/04/98

ORAL JUDGEMENT

By this application under Art. 226 of the Constitution of India, the petitioner challengs the legality and validity of the order of detention dt. 16th November, 1997 passed by the Police Commissioner for the City of Baroda invoking his powers under Sec. 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short the "Act"), pursuant to which the petitioner is arrested and kept under detention.

2. Necessary facts which led the petitioner to

prefer this application may in brief be stated. The Police Commissioner for the City of Baroda came to know that the petitioner was dealing in liquor in huge quanity and to carry out his such business, he was harassing the people who came in his way. With the result, different types of disturbances namely riots, affray, hubbub, bafles etc. in public places, were the routine. He also found that in this connection, several complaint were also filed at different Police Stations. When he checked the records, he knew that about five complaints of the offences punishable under Secs. 66(b), 65(e) and 81 of the Bombay Prohibition Act were filed with Varanama Police Station, Raopura Police Station and Prohibition Police Station. It is alleged in those complaints that the petitioner was found in possession of liquor without any pass or permit and the quanity of liquor was ranging from 5 liters to 315 liters. The Police Commissioner, after inquisition, could note that the petitioner was the head-strong person i.e. the tartar and by his subversive activities, he was disturbing the public order and terrorising the people. After inquisition, the Police Commissioner also found that the petitioner was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order and spreading pandemonium were going berserk. No one was, therefore, ready to come forward and state against him. Every one thought it wise to put up with petitioner's atrocities. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After the detailed inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, is in custody.

3. Challening the order, the learned advocate representing the petitioner rasied several grounds but at the time of submission, when query was made, he tapered off of his submission confining to the only ground namely exercise of privilege under Sec.9(2) of the Act. According to him, no doubt Sec.9(2) of the Act, the authority is invested with the privilege not to disclose certain facts in public interest, but the privilege has

to be exercised judiciously. There was no justification for the authority passing the detention order to deprive the petitioner of the opportunity to submit, exercising the privilege under Sec.9(2) of the Act. The detaining authority ought to have disclosed the particulars of the witnesses whose statements were recorded in support of the order passed. No doubt, under Section 9 of the Act, the authority has the privilege, but that is to be exercised judiciously, and not arbitrarily or capriciously so as to deprive the detenu of his right to have effective representation. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the order. The instances about the offences noted in the order were not sufficient to brand him a dangerous person or to form a reasonable belief that maintenance of public order was adversely affected. The statements recorded are vague and necessary particulars when wanting, the order is bad in law and is liable to be quashed.

4. In reply to such contention, Mr.Kamal Mehta, the learned APP has vehemently refuted the allegations made, submitting that the authority passing the detention order has considered all the materials and appreciating the case from relevant different angles reached the conclusion that certain particulars about the witnesses were required to be kept secret because retaliatory action from the petitioner could not be denied and safety of the witnesses was also likely to be endangered. When in public interest, the privilege is exercised, the order passed is required to be maintained.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be

against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority was

required to file the affidavit and satisfy the court that it was in the public interest namely to protect the lives of the witnesses certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case affidavit justifying the circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what defence he could take, what were the reasons to state against him and whether in fact those witnesses really stated so or whether they were really in existence. Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is therefore liable to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 16th November, 1997 by the Police Commissioner, for the city of Baroda, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forth with, if no longer required in any other case. Rule accordingly made absolute.

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